Separate Statement of Chairman William E. Kennard
PCIA's Broadband Personal Communications Services Alliance's
Petition for Forbearance for Broadband Personal Communications Services

Today, the Commission takes an important step toward ensuring that the competition we are beginning to see emerge in the mobile telephony market will continue in a manner that benefits America's consumers. Based on the record presented in this proceeding, and information the Commission compiled in its Third Annual CMRS Competition Report, we wisely reject the request by the Personal Communications Industry Association ("PCIA") to forbear from core protections against discrimination and unfair dealing contained in sections 201 and 202 of the Communications Act. By rejecting this request, our decision today ensures that all American mobile telephony consumers will have the basic ability to obtain telecommunications service on no less favorable terms than other similarly situated customers, and not just those who live in markets characterized by widespread competition. Based on the centrality of these protections, which have served us well in both competitive and non-competitive contexts, it would be an abdication of our responsibility to consumers to rely simply on the workings of the market to ensure that Americans receive quality service at fair and reasonable prices.

At the same time, we take steps to ensure that prices charged by providers of mobile telephony services will continue their current downward trend by preserving the Commission's CMRS resale rule. This transitional rule, which will sunset five years after a date noted in a Public Notice issued concurrently with this Order, ensures that incumbent mobile telephony providers will be subject to price and service competition by resellers while their facilities-based competitors are building out their systems. The presence of resellers will serve to ensure that facilities-based carriers treat consumers fairly.

Our actions today also ensure that resale will continue as a viable strategy for entry into telecommunications by small and minority-owned businesses. These businesses, which often do not have the large amounts of capital needed to build out facilities, frequently are able to effectively serve niche or otherwise underserved markets. Many segments of our society would go unserved or underserved without them. Our Order ensures that resellers will continue to operate in this market in a manner that benefits consumers.

Although I reject PCIA's petition to forbear from enforcement of Sections 201, 202 and the Commission's CMRS resale rule, I would like to reiterate my commitment to Commission forbearance from unnecessary regulation. I want to emphasize my interest in forbearance from enforcing provisions of our rules that inhibit or distort competition in the marketplace, represent unnecessary regulatory costs, or stand as obstacles to lower prices, greater service options, and higher quality services for American telecommunications consumers. I welcome future opportunities to extend the Commission's exercise of its forbearance authority in furtherance of these goals and, to that end, I note the Commission's decision to adopt, as part V of this Order, a Notice of Proposed Rulemaking seeking comments on possible forbearance from additional provisions of our rules.

Section 10 of the Communications Act gives the Commission a powerful tool by allowing the Commission to forbear from the application of virtually any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or a class of carriers or services. Congress was clear in enunciating the specific test that must be applied by the Commission in its consideration of whether to forbear from the provisions of the Telecommunications Act or our regulations.[1] In this case, the record demonstrated that forbearance should be granted with regard to several of the provisions cited by the petitioners (certain tariffing requirements for international service offered directly to customers and certain requirements of Section 226 of the Telecommunications Act, TOSCIA (Telephone Operators Consumer Services Improvement Act)). However, the record clearly demonstrated that the Commission should not forbear on a national basis from enforcing sections 201 and 202, or the resale rule at this time. One-size-fits-all forbearance in this instance would not adequately protect consumers or the public's interest in robust competition. Although the record does not support forbearance on a national basis at this time, I would welcome future petitions to forbear from the CMRS resale rule for specific geographic markets based on the factors delineated in the Commission's Order. I encourage parties seeking future forbearance to submit specific showings and particularized evidence so that the Commission can analyze fully whether their requests satisfy each part of the test prescribed by Congress.

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[1] Under section 10, we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if a three-pronged test is met. Specifically, section 10 requires forbearance if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a)(1-3).

Joint Statement of Chairman Kennard and Commissioners Ness and Tristani, PCIA's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, WT Docket No. 98-100

Despite the rhetoric in the dissenting statements, the disagreements between the majority and the minority pertain to two simple issues. First, should CMRS carriers be freed of their statutory obligation to provide service on just, reasonable, and not unreasonably discriminatory terms and conditions? Second, and more particularly, should they be free to refuse to provide service to resellers on the same terms and conditions as they offer it to other customers? The majority says "no" to both questions.

But this is a far cry from heavy-handed regulation or "central economic planning." Free market auctions, not government planners, determine which entities are awarded PCS spectrum. Licensees, not bureaucrats, formulate business strategies and marketing plans. Carriers, not state or federal regulators, establish the prices charged for CMRS services, prices that can be changed at will. And the free market, not the government, will ultimately decide whether the additional businesses that are able to enter the market as resellers -- and thereby provide increased competition in the CMRS marketplace -- will succeed or fail in providing the services protected against discrimination in this order.

The issue today isn't whether a market with multiple providers should be regulated the same as a market with a single provider. Of course not. But the fact is that the provisions of the Communications Act, and of the Commission's rules, need not be applied, and should not be applied, on an "all or nothing" basis.

A market with two suppliers is better than a market with only one. If a consumer has four, five, or six choices of suppliers of similar services, instead of two, the prospects for substantial competition are much improved. But the presence of a particular number of competitors does not mean that each and every statutory provision and rule have become irrelevant. Certain elemental "rules of the road" may still be appropriate to ensure fair competition and consumer protection. Congress recognized this in formulating the three-part test for application of the Commission's forbearance authority.

Today's decision reflects the majority's application of the statutory forbearance standards to the particular provisions at issue, in light of the record currently before the Commission. The majority stands ready to evaluate additional forbearance petitions, and to grant relief wherever the statutory standards are fulfilled. But mere assertions that a particular number of competitors have entered a market -- or overheated rhetoric about excessive regulation -- will not substitute for the analysis required by Section 10 of the Communications Act.

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

In re: Memorandum Opinion and Order
and Notice of Proposed Rulemaking
Personal Communications Industry Association's Broadband
Personal Communications Services Alliance's Petition for Forbearance
for Broadband Personal Communications Services

I respectfully dissent from this very limited forbearance action. I agree with Commissioner Powell's well-reasoned view, as articulated in his dissenting statement, that the majority's forbearance analysis under Section 10 of the Telecommunications Act[2] is flawed, especially as applied to the Commission's mandatory resale rule.[3] I write a separate dissent, however, to challenge the majority's implicit view that manifest competition -- indicated by the existence of as many as six facilities-based competitors in some markets -- provides insufficient justification to deregulate.

Fundamentally, I believe the question regulators should ask about existing rules is not whether there is sufficient justification to *de*-regulate but, rather, whether there is continuing justification to regulate. And, of course, regulation is justified only if the benefits of the regulation significantly exceed the costs. In this particular case, I believe the answer is that there no longer is justification to impose the mandatory resale rule, particularly in markets with four or more facilities-based broadband wireless carriers. The costs of the rule simply outweigh the benefits.

Wireless Competition

It has been said recently that "the market for wireless services is a dynamic, expanding market that is providing new services to consumers at lower prices,"[4] that "[t]he wireless telephone industry . . . is already the exemplar of fierce competition,"[5] and that "[c]onsumers in

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2 47 U.S.C. § 160.

3 47 C.F.R. § 20.12(b) (1997).

4 *Separate Statement of Chairman William E. Kennard in re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* FCC 98-91, (May 14, 1998).

5 *Press Statement of Chairman William E. Kennard in re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services* (March 24, 1998).

many markets already enjoy a substantial reduction in rates as a result of PCS competition."[6] I fully agree.

Just look at the attached map, which is reprinted from the *Third Annual CMRS Competition Report* the Commission adopted a few weeks ago.[7] In at least eight areas of the country, there are *six* mobile telephone operators. In another forty or so areas, there are five mobile telephone operators; over fifty other areas have four operators. In at least these hundred areas, which generally are the most populous areas in America, fierce competition in mobile telephone service indeed has arrived.

Mandatory Resale

And, yet, says the majority, we must retain our mandatory resale requirement, which has its roots and justification in the duopoly wireless environment.[8] Although I have serious doubts about the public benefits of the mandatory resale rule even in non-competitive markets, it defies common sense to continue to impose such a rule in competitive markets.

Resale itself is not burdensome, of course, and, in fact, can be a great boon to consumers and facilities-based wireless service providers alike. Indeed, *voluntary* resale facilitates service to unserved or underserved communities. For example, if a facilities-based wireless provider were not yet effectively marketing service to an insular community in the provider's service area, the provider would have strong incentives to give a wholesale price break to a reseller with ties to the insular community. The facilities-based provider then would be able to effectively serve a community that it was not serving before, the reseller with ties to the community would have a good business opportunity and, most importantly, the previously unserved or underserved community would receive service. Under a *mandatory* resale rule, however, facilities-based service providers would not want to offer a price break to resellers with ties to insular communities because all other resellers, including those serving mainstream business and residential markets, would be entitled by regulation to take advantage of the price break.

The majority was not willing, at least in this order, to forbear from the mandatory resale rule on either a nationwide basis, as was requested in the PCIA petition, or on a market-by-

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6 *Separate Statement of Commissioner Susan Ness in re Amendment of the Commission's Rules Regarding Installment Payment Financing for C-Block Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82 (October 16, 1997).

7 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 98-91 (adopted May 14, 1998).

8 Under this FCC requirement, an interpretation of Section 20.12(b) of our Rules, 47 C.F.R. § 20.12(b) (1997), service providers may not prohibit resale of their service and must offer resellers the best deals that are offered to other customers.

market basis. To its credit, however, the majority says that the FCC will be open to future petitions for forbearance on a market-by-market basis. This makes common sense. Why make the citizens of Miami suffer under the mandatory resale rule while waiting for Cheyenne to "become competitive?"

Unfortunately, the majority believes that competition measured by sheer numbers of competitors is not good enough. Indeed, the majority says the mere existence of many -- say, four, five, or six -- facilities-based service providers in a market is insufficient reason to forbear from the mandatory resale rule. They say the Commission should consider other factors, such as "the extent of resale activity" (how can that be meaningful information given the existing mandatory resale requirement?), "the value of service to previously unserved or underserved markets" (again, how can this be quantified given the existing resale rule?), and "other factors" (anything goes!). In spite of these vague and quite unhelpful FCC suggestions, I hope future petitions for forbearance will be submitted on a market-by-market basis and simply will indicate the number of carriers serving that specific market. I should think that four facilities-based competitors would be an adequate showing of competition for this purpose.[9]

Section 11

Not only would the majority's test for future forbearance petitions be very difficult for the Commission to administer, it would ignore Section 11 of the Telecommunications Act,[10] which directs the Commission to repeal or modify regulations that are "no longer in the public interest as the result of meaningful economic competition between providers of such service."[11] Surely, under such a straightforward test, markets with four, five, or six facilities-based competitors would be deemed competitive and no longer in need of a mandatory resale rule.

In addition, as to Section 11, I must state yet again that this item should not be mistaken for complete compliance with that section's requirements. As I have explained previously, the FCC is not planning to "review *all* regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service," as required under Subsection 11(a) in 1998 (emphasis added).[12] Nor has the Commission issued general principles to guide our “public interest” analysis and decision-making process across the wide range of FCC regulations.

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[9] Because some areas may never be able to support more than two or three facilities-based service providers, the showing of at least four facilities-based service providers should be necessary for forbearance from the mandatory resale rule only until the rule sunsets.

[10] 47 U.S.C. § 161.

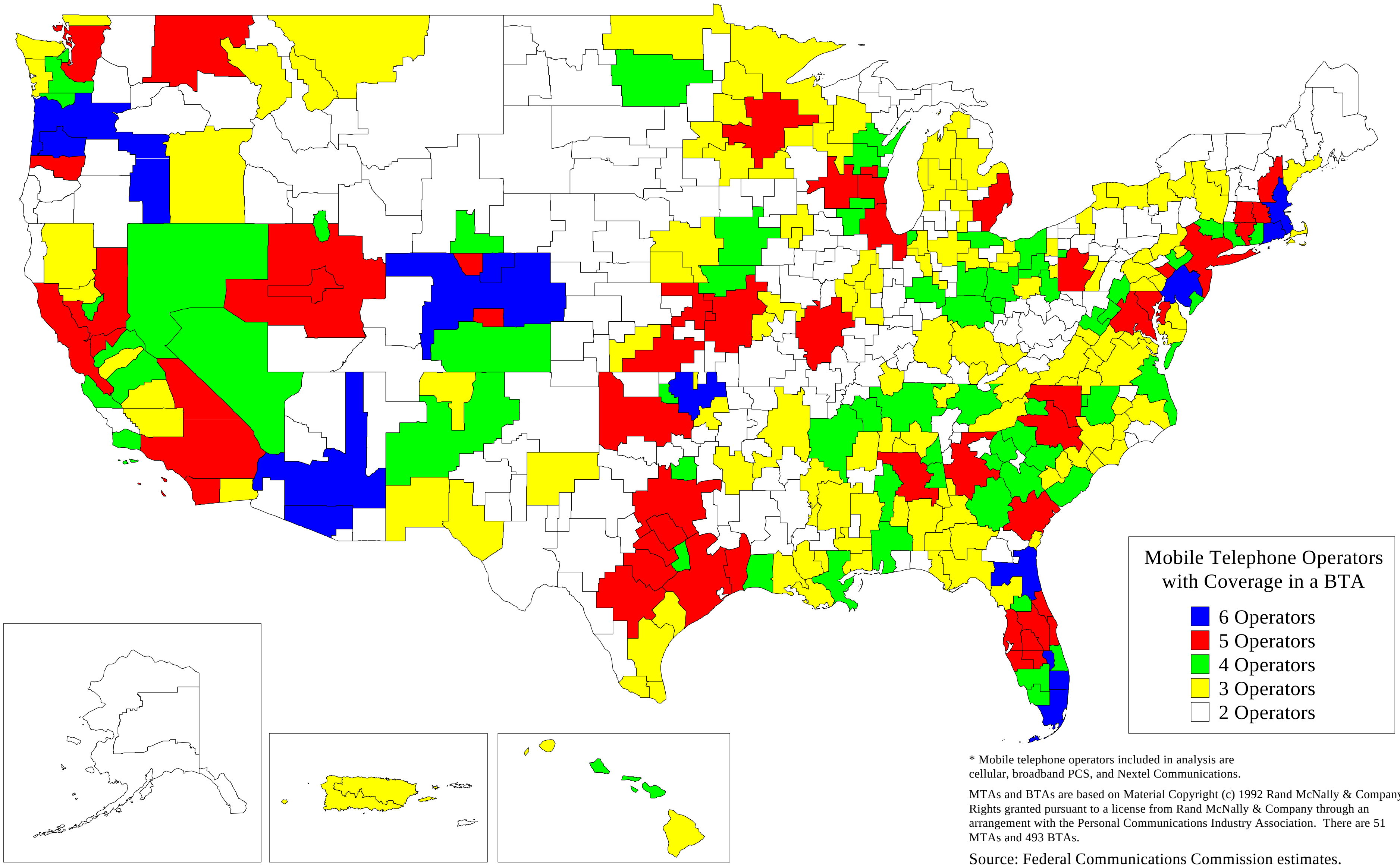
[11] *Id.*

[12] *See generally 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040 (released Jan. 30, 1998).

In one important respect, however, the FCC's current efforts are more ambitious and difficult than I believe are required by the Communications Act. Subsection 11(a) -- "Biennial Review" -- requires only that the Commission "***determine*** whether any such regulation is no longer necessary in the public interest" (emphasis added). It is pursuant to Subsection 11(b) -- "Effect of Determination" -- that regulations determined to be no longer in the public interest must be repealed or modified. Thus, the repeal or modification of our rules, which requires notice and comment rule making proceedings, need not be accomplished during the year of the biennial review. Yet the Commission plans to complete roughly thirty such proceedings this year.

I encourage parties to participate in these thirty rule making proceedings. I also suggest that parties submit to the Commission -- either informally or as a formal filing -- specific suggestions of rules we might determine this year to be no longer necessary in the public interest as well as ideas for a thorough review of all our rules pursuant to Subsection 11(a).

Estimated Mobile Telephony Service Deployment: Number of Operators* in Each BTA with Some Level of Coverage



* Mobile telephone operators included in analysis are cellular, broadband PCS, and Nextel Communications.

MTAs and BTAs are based on Material Copyright (c) 1992 Rand McNally & Company. Rights granted pursuant to a license from Rand McNally & Company through an arrangement with the Personal Communications Industry Association. There are 51 MTAs and 493 BTAs.

Source: Federal Communications Commission estimates.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL, DISSENTING IN PART

Re: *Personal Communications Industry Association's ("PCIA") Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*

I concur in this decision to the extent it grants forbearance for carriers in the Commercial Mobile Radio Services ("CMRS") with regard to international tariffs and certain provisions of TOCSIA. I am also unwilling to grant PCIA's request for forbearance from sections 201 and 202, but solely out of concern with the regulatory asymmetry that would result from limiting forbearance to broadband PCS providers. (I discuss this more fully below.) To be clear, I do not necessarily share the majority's reasoning for reaching the same result.

While I would be remiss not to be somewhat encouraged by the Order's "commitment to forbear" and the proposals in the Notice to forbear from additional provisions, I fear that these words cannot live up to the heavy burden imposed on this and future petitioners. The majority decision denies most of the subject request to forbear based on speculative fears and outdated rationales that raise the bar so high that future and pending forbearance petitions -- even in the most competitive segment of the telecommunications industry and in geographic markets that are fully competitive -- do not seem to stand a chance. The current and foreseeable competitive developments in the CMRS market and the deregulatory, pro-competitive mandates of the 1996 Telecom Act require more faith in markets and in consumers. Accordingly, I respectfully dissent from those parts of the Order establishing the framework and rationale for reviewing this and future forbearance petitions.

Section 10 of the Communications Act, added by Title IV (Regulatory Reform) of the 1996 Telecom Act, provides that the Commission *shall* forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, *if* the Commission determines that such deregulatory action meets the three-prong forbearance test.[13] Under the first prong, we must determine whether enforcement of a regulation or statutory provision is *not* necessary to ensure that the charges, practices and classifications are just and reasonable and are not unjustly or unreasonably discriminatory. The second prong requires us to determine whether enforcement of a regulation or provision is *not* necessary for the protection of consumers. The last prong asks whether forbearance is *consistent with* the public interest. As part of this "public interest" prong of that test, Congress commands the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among

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[13] *See* Pub. L. No. 104-104, Title IV, § 401, 110 Stat. 128 (1996); 47 U.S.C. § 160(a).

providers of telecommunications services.[14] Section 10 is a very important provision of the pro-competitive, deregulatory 1996 Act.[15] Petitions for forbearance should be taken very seriously and the standards for granting forbearance must be applied clearly and consistently in furtherance of the objectives of the 1996 Act.

PCIA has asked for forbearance from certain provisions of Title II of the Communications Act and the Commission's rules for a particular class of telecommunications services and carriers: broadband PCS, the "new kid on the block" in the mobile communications market.[16] Broadband PCS providers are a class of CMRS providers subject to section 332(c) of the Communications Act, which was added by the 1993 Omnibus Budget Reconciliation Act.[17] Other CMRS providers include cellular carriers, Specialized Mobile Radio ("SMR") service providers, paging companies and narrowband PCS providers. We recently reported to Congress that, due largely to the implementation of new broadband PCS systems across the country, competition in the CMRS industry "has grown more than it has ever before," that, in the mobile telephone market (broadband PCS, cellular and SMR), "the signs of competition are clear" and that "the paging/messaging market has been highly competitive for a number of years" and is beginning to face even more competition from other wireless sectors.[18] Most significantly, we concluded that mobile telephone operators are beginning to position their services as "true

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[14] 47 U.S.C. § 160(b). If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

[15] We must always be reminded that in the 1996 Act, Congress' principal objective (and the Commission's mandate) was to "*promote competition and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *See* Pub. L. No. 104-104, 110 Stat. 56 (1996) (preamble to the Act) (emphasis added).

[16] *See* PCIA Petition at 2.

[17] Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A)(iii), 107 Stat. 393 (1993); 47 U.S.C. § 332(c) (providing that persons engaged in the provision of CMRS shall, insofar as such person is so engaged, be treated as a "common carrier" for purposes of this Act, except that the Commission was authorized to forbear from enforcing any provision of Title II of the Act, except sections 201, 202, and 208.) The three-prong forbearance test in section 332(c) is nearly identical to the newer forbearance provision. Section 10 of the Act, however, provides that "Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any <u>regulation</u> or <u>any provision of this Act.</u>" 47 U.S.C. § 160(a) (emphasis added).

[18] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Third Report*, FCC 98-91, at 2 (released. June 11, 1998) ("CMRS Competition Report").

replacements for the wire-based services of LECs."[19]

In light of the developments since PCIA filed its forbearance petition over a year ago, the first question that comes to my mind is whether a particular class of CMRS -- a particular technology, a particular frequency band -- should be singled out for regulatory forbearance. I think the answer is clearly "no." Promoting competition is not necessarily about promoting certain competitors or technologies -- even the new kids on the block -- over others. Therefore, I concur with the Order's extension of forbearance for international tariffs and TOCSIA to all CMRS carriers. I also agree that, under the public interest prong of the forbearance test, it would be unwise to create "regulatory asymmetry" among competing CMRS carriers.

The next question, then, is whether we should forbear from the provisions raised by PCIA for the broader class of CMRS. In analyzing this question, which is especially timely in view of the tremendous growth and promise of competition in the CMRS market which we recently reported to Congress, I respectfully disagree with the regulatory approach taken in this Order. I would have preferred to focus on the positive developments that competition is bringing to consumers in the form of lower prices and innovative services, instead of signaling the continued, indefinite need for regulatory intervention even when all relevant product and geographic markets become substantially competitive.[20] I am increasingly concerned that we are setting up a misguided framework for addressing competition and deregulation questions that will perpetuate regulation, institutionalize government intrusion in markets, and inhibit the full blossoming of competition all in direct contravention to Congress' wishes. Such a framework will go a long way in securing regulators a leading role in telecommunications markets, but will do little to promote the robust, high quality competition that Congress envisioned and from which consumers will really benefit. I outline my concerns more fully below.

First, I question the suggestions in this Order (and others) that we regulators are the "master chefs" of competition, carefully mixing the ingredients, setting the oven temperature and monitoring the cooking. And, that only we decide if competition "is soup yet" while consumers eagerly wait to be fed. From this perspective, deregulation apparently is viewed as dessert, something you cannot have until competition is cooked and consumed, rather than a necessary ingredient to competition. This Order is sprinkled with such suggestions.[21]

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19 *Id.* at 63.

20 *See* Order at ¶ 23. I respectfully disagree with the Chairman's statement that "it would be an abdication of our responsibility to consumers to rely simply on the workings of the market to ensure that Americans receive quality service at fair and reasonable prices." I would suggest that it would be irresponsible not to constantly reexamine the continued necessity for regulation of competitive markets.

21 For example it explains in several places that, despite the tremendous inroads toward substantial competition among CMRS providers, competitive development "is not yet complete and continues to require monitoring." It also says that "prices for mobile telephone service have

I reject the view that competition is a product of the regulator's handiwork. I believe instead our task is more humble -- to shift economic decisions to the market and out of the hands of central planners. The "master chef" approach is fundamentally flawed. For one, it views competition as a product. Competition is not that at all, it is a dynamic process by which producers and consumers interact to establish prices and output that reflect the value of such goods and services to consumers willing to pay. And, it is a process that drives the introduction of new innovative products and services. Those prices may ebb and flow and products may vary from one market to another, depending on the unique attributes of individual markets and consumers. The interaction of the market determines the outcome. Regulation of competitive markets distorts the competitive process, for such regulation attempts to pronounce appropriate conditions rather than letting the process determine those conditions. There is no "right price," no "appropriate level of services," no real ability for regulators to know when its "soup" yet.

As a general matter, deregulation is a critical pre-condition to competitive conditions because it removes government interference between consumers and producers. The Order admits as much when it gives credit to earlier deregulatory efforts involving state preemption and CMRS forbearance (when there was still a cellular duopoly) for "contribut[ing] significantly to the impressive growth of competition in CMRS markets."[22] It is one thing to ensure that monopolies do not reign and that barriers to competition have been removed. It is quite another, however, to use deregulation as a tool, carrot or stick to engineer our own vision or values as to the nature, scope and quality of goods and services that we believe should be produced by competition. This is especially true where, as is the case with CMRS, the market seems to be functioning properly.[23]

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been falling," but these price declines "have been uneven, and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace." Order at ¶ 22 (footnote omitted). I would note that a competitive market (particularly, when we view the entire nation as the market, as we often do) rarely treats all consumers the same. Variations in price among different consumers can be a reflection of many things. Some consumers are high volume users, some consumers are more willing to switch providers than others, some consumers demand advance features more than others, some want low cost basic services. All this means that prices and services will always vary in fully competitive markets. "Uneven price decreases" cannot, thus, be taken as a sign that a market is un-competitive. Indeed, it may easily be a reflection of competitive conditions.

[22] Order at ¶ 8. As noted above, section 10(b) requires that the Commission consider whether forbearance from enforcing the provision or regulation *will* promote competitive market conditions, including the extent to which such forbearance *will* enhance competition among providers of telecommunications services. The suggestion that abounding competition is a pre-condition for forbearance would turn this provision on its head.

[23] Traditionally, a market is thought to be healthy if prices reflect marginal costs, there is growth and no restriction of output, and we see continuing innovation. All of these indications appear to

Second, the Order seems to set up a false choice between competitive free markets and consumer protection. For example, the Order states that even "[a]ssuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner. Competitive markets increase the number of service options available to consumers, but they do not necessarily protect all consumers from all unfair practices."[24] The item speculates that under "certain conditions" -- namely, different CMRS technologies, different frequency bands, the cost of a new handset and the current lack of number portability -- may "undermine market discipline."[25] Under such conditions, according to the Order, carriers "have the opportunity and incentive to treat some of their existing customers in an unjust, unreasonable, and discriminatory manner, as compared with similarly situated potential new customers."[26] I worry that if we define consumer protection so broadly as to suggest that we must ensure that every consumer is protected from every speculative or possible harm that we can imagine in our creative minds, we will never feel comfortable deregulating, for no form of competition can guarantee such results (nor do I believe regulators can either).

I believe government has a role to play in protecting consumers from harm. But, such harms should be specific and identifiable, not merely consequences regulators can imagine producers have an incentive to inflict. No one should quibble about government intervention that protects the health and safety of consumers, for example. Nor, as a proponent of strong enforcement mechanisms, would I dispute the need for some government intervention to protect against the anticompetitive harms of market failure and monopoly prices, as well as to prevent fraud, misrepresentation and the like. But, as I read the Order, consumer protection is being

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be present in the CMRS market generally.

[24] Order at ¶ 23 (emphasis added).

[25] *Id*.

[26] *Id*. I disagree that we can instill or even affect market discipline by regulatory fiat. It is also somewhat dramatic to suggest that, in a competitive market, carriers will "abuse" their current customers. If those existing customers (whether abused, just disenchanted, or stolen away by more attractive offers) switch providers, such switching or churn surely is one measure of a competitive market, but lack of switching alone cannot compel the conclusion that competitive conditions are absent. If other providers fail to offer choices the consumer values enough to leave their current provider, that does not mean that the consumer is vulnerable to abuse because the market is not competitive. Indeed, such a condition may promote innovation, as competing providers hunt for new products and service options that entice that customer away. Furthermore, in a growth industry competition may, for a time, focus on new customers rather than competing for existing customers, but I fail to see how that means a market is not competitive.

raised not merely to guard against harm but as a moniker for a consumer right to a certain number of competitive alternatives, to certain prices, and to certain services all deemed by the regulator. Even were this laudable in some sense, it is slight of hand to call it protecting consumers from harm in a competitive world. It is simply old-style regulation with a pretty bow tied on it.

It is a complete fallacy that the risks of free market competition are greater than the benefits it brings. I believe firmly that competitive markets are the most consumer benefiting economic model every devised by mankind. Indeed, the noted economist Friedrich Hayek contended that markets work far better than "planned economies," because they "utilize the knowledge and skill of all members of society to a much greater extent than would be possible in any order created by central direction."[27] And yet, I sense too often we overlook this fundamental truth. Instead, we take counsel of our fears and overstate our ability to manage competition to avoid those things we fear.

Moreover, I do not believe that consumer protection should be invoked merely to protect certain firms from competition. It should carry no weight that a given business model will suffer or disappear if the government no longer guarantees its viability, provided that the ability and opportunity to provide the same value to consumers is transferred from firms of the defunct model to other firms. For example, with CMRS resale, the Yankee Group recently concluded,

> there may actually be a future for resellers . . provided they can endure the rigors of competition. As carriers focus more on increasing the utilization of their digital network capacity, they will recognize resale as a vital and viable distribution channel. At the same time, economic pressure threatens the reseller's ability to remain a player in the wireless game without the assistance of specialized third-party service providers. The existence of harmonious resale deals, including the likes of MCI, <u>suggests regulation is not necessary to ensure the future of wireless resale</u>, but rather the soundness of the business proposition will make the possibilities plain. Therefore, the onus is on wireless resellers to determine innovative ways of complementing the business of the carriers, while ensuring profitable business models for themselves.[28]

Regulators are in no position, and are incapable, of ensuring a successful business model. Once the resale rule sunsets or upon earlier forbearance in certain geographic markets, competitive market forces, technological developments, marketing innovations and other factors (not

[27] Friedrich Hayek, *Studies in Philosophy, Politics, and Economics* (University of Chicago Press, 1967), 162.

[28] The Yankee Group, Wireless Resale: Is There a Future?, Executive Summary (February 1998) (found at http://research.yankeegroup.com on June 22, 1998) (emphasis added).

regulatory mandates) will better serve to pick the winning and losing business models.

Nevertheless, this Order reaches out to micromanage market forces by imposing "factors" that will be considered in evaluating future petitions seeking forbearance from the resale rule. One of these factors is "the value of service to previously unserved or underserved markets."[29] I am at a loss as what constitutes an "unserved" or "underserved" market let alone how we will "value" such service.

Finally, I would say a word about enforcement. I recognize that competition can fail to function properly if there are barriers to entry, monopolists with market power that can ignore normal market forces, and other conditions that can frustrate the proper functioning of the market to the detriment of consumers. In these areas, I believe in strong enforcement to ensure that the foundations of competition are not threatened. But such an exercise is a far cry from managing competition and tinkering with producer and consumer behavior on a nationwide scale. Enforcement is policing misconduct, not actively guiding competitors and directing the evolution of markets.

In sum, the 1996 Act mandates, through forbearance or other means, that the Commission move away from the monopoly-oriented, over-regulatory origins of communications policy and toward a world in which the market, rather than bureaucracy, determines how communications resources should be utilized. Yet, so often, we cannot actually bring ourselves to let go, to jump off our regulatory perch. We need to attack the hard questions like whether all aspects of traditional "common carrier" regulation continues to be relevant in the new competitive world of telecommunications. It is true that risks await in free markets: risk that the consumers will be harmed by anti-competitive conduct on the part of firms with market power; risk that communications companies may be acquired, downsized or driven out of business; and risk that some individuals will not vie successfully for the many choice jobs that competition will create. Though these fears are not inconsequential, they nearly always are overstated and tend to paralyze us from taking action that would allow markets to flourish and competition to grow. Instead, we speculate about possible anticompetitive effects and then adopt policies intended to protect new entrants and consumers from them. Rather than protect these interests, however, we more often, in practical effect, handicap the market and postpone the arrival of competition and consumer choice.

[29] Order at ¶ 44.